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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHEL GELINAS,)	NO. 08-CV-02137 (PVT)
)	
Plaintiff,)	
)	
v.)	NOTICE OF MOTION AND
)	MOTION TO DISMISS OR IN THE
THE BERGQUIST COMPANY,)	ALTERNATIVE TRANSFER OR
)	STAY PROCEEDINGS
Defendant.)	
)	DATE: JULY 29, 2008
)	TIME: 10:00 A.M.
)	DEPT: COURTROOM 4TH FL.
)	
)	
)	

PLEASE TAKE NOTICE that Defendant The Bergquist Company, hereby
moves the Court for an order dismissing the above-entitled action.

The Motion is based upon the ground, among others, that there is a previously
filed action involving the same Plaintiff and Defendant named in this action, and the same
subject matter, currently pending in the United States District Court for the District of
Minnesota in the action: *The Bergquist Company v. Michel Gelinas*, Court File No. 08-CV-

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1 00569. Because the Minnesota action was first filed and concerns the same parties and subject
2 matter as this case, Defendant respectfully requests that this action be dismissed, stayed, or
3 transferred to the District of Minnesota.

4 This Motion is supported by the following Memorandum of Points and
5 Authorities and Declaration of Bruce J. Douglas, filed herewith.

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7 **DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS OR IN**
8 **THE ALTERNATIVE TRANSFER OR STAY PROCEEDINGS**

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INTRODUCTION

This matter is before the Court on the Defendant's Motion to Dismiss the action on the ground that there is a previously filed action between these parties concerning the same subject matter pending in the U.S. District Court for the District of Minnesota. Additionally, the parties have submitted this dispute for resolution in accordance with the applicable Rules of the National Arbitration Form in Minneapolis. Defendant respectfully requests that this Court apply the first-filed rule to dismiss this action. Alternatively, Defendant requests the Court to transfer this action to the District of Minnesota, or stay proceedings until the matters are resolved in arbitration pursuant to the parties' agreement.

I. PROCEDURAL HISTORY

A. The Minnesota Federal Court Action

On February 28, 2008, The Bergquist Company ("Bergquist") commenced an action in the U.S. District Court for the District of Minnesota seeking to compel Michel Gelinas ("Gelinas") to proceed to arbitration to enforce its Non-Competition, Non-Solicitation, and Confidentiality Agreement and to stay any other court proceedings that he might commence, file number 08-CV-00569-DWF-JJK. Declaration of Bruce J. Douglas ("Douglas Decl.") ¶ 2, Exh. A.

On March 27, 2008, Bergquist mailed to Gelinas, pursuant to Fed. R. Civ. P. 4, a copy of the Complaint in the Minnesota action and a Waiver request (Fed. R. Civ. P. Form 6). Gelinas received the Complaint and Waiver request on April 1, 2008. See Douglas Decl. ¶ 3, Exh. B. However, Gelinas did not return the Rule 4 Waiver and, despite a request made to his counsel that Gelinas or his counsel accept service, Bergquist received no response. The Summons and Complaint in the Minnesota action were served personally upon Gelinas on May 13, 2008. Douglas Decl. ¶ 4, Exh. C. Gelinas has appeared in that action and requested an Extension of time to Answer the Complaint.

1 On June 4, 2008, Bergquist filed in the District of Minnesota its Motion to
2 Compel Arbitration and supporting papers. Douglas Decl. ¶ 5, Exh. D. A hearing on the
3 Motion to Compel Arbitration is scheduled to be heard by the federal court in Minnesota on
4 July 18, 2008. Douglas Decl. ¶ 6, Exh. E.

5 **B. The California State Court Action and Removal to this Court**

6 Meanwhile, on March 27, 2008, Gelinas filed an action in Superior Court of
7 California, Santa Clara County, file number 108CV109164. On April 24, 2008 Bergquist
8 timely removed that action to this Court. See Docket No. 1. Gelinas' Complaint in this action
9 seeks to declare the parties' agreements unenforceable. Gelinas has filed in this Court a Motion
10 to Remand the action to the state court. That Motion is scheduled for hearing on July 29, 2008.
11 See Docket No. 13.

12 **C. The National Arbitration Forum Proceeding**

13 On February 28, 2008, Bergquist also filed a demand for arbitration at the
14 National Arbitration Forum ("NAF"). Douglas Decl. ¶ 7, Exh. F. On March 18, 2008, the
15 NAF accepted the case. Douglas Decl. ¶ 8, Exh. G. Bergquist promptly notified Gelinas of the
16 arbitration demand.

17 On May 5, 2008, Gelinas filed his Response at the NAF in Minneapolis,
18 Minnesota. Douglas Decl. ¶ 9, Exh. H. In his Response, Gelinas asserts essentially the same
19 arguments that he makes in this action. Gelinas also filed a Counterclaim at the NAF in
20 Minneapolis, Minnesota where he argues to the merits of the case asserting that he is entitled to
21 \$92,6178.40 in unpaid bonuses, commissions, and wages. *Id.*

22 On May 15, 2008, Gelinas requested that the NAF stay its proceedings pending
23 the outcome of this case. Douglas Decl. ¶ 10, Exh. I. In a letter dated May 20, 2008, the NAF
24 informed the parties that it had stayed the arbitration proceedings. Douglas Decl. ¶ 11, Exh. J.
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1 Nevertheless, both Gelinas and Bergquist are pursuing relief in the arbitral forum and have
2 requested a participatory hearing. Douglas Decl. ¶12, Exh. K.

3 **II. FACTUAL BACKGROUND**

4 Plaintiff Michel Gelinas (“Gelinas”) is a citizen of the State of California.
5 Defendant The Bergquist Company (“Bergquist”) is a Minnesota corporation having its
6 principal place of business in Minnesota. Bergquist is in the business of manufacturing and
7 supplying thermal management products and other products. Douglas Decl. ¶ 2, Exh. A.

8 On April 12, 2004, Bergquist extended an offer of employment to Gelinas as a
9 Regional Sales Manager at an annual base salary of \$115,000. Douglas Decl. ¶ 13, Exh. L.
10 The offer stated that Gelinas’ total compensation would be \$140,000 per annum including
11 bonuses. *Id.* Contemporaneously with the acceptance of the offer and commencement of
12 employment with Bergquist, Gelinas signed a Non-Competition, Non-Solicitation, and
13 Confidentiality Agreement (“Non-Compete Agreement”) dated by him April 27, 2004.
14 Douglas Decl. ¶ 14, Exh. M. The Non-Compete Agreement provides that it “should be
15 interpreted and enforced in accordance with the laws of the State of Minnesota, without regard
16 to its choice of law principles or rules.” *Id.*

17 On or about May 4, 2004, Gelinas commenced employment with Bergquist as a
18 Regional Sales Manager. Douglas Decl. ¶ 14, Exh. M. During the course of Gelinas’
19 employment with Bergquist, he was responsible for a territory that included Oregon,
20 Washington, California and parts of Canada. Douglas Decl. ¶ 13, Exh. L.

21 On October 23, 2007, Bergquist proposed a binding Separation Agreement and
22 General Release (“Separation Agreement”). Douglas Decl. ¶ 15, Exh. N. The Separation
23 Agreement stated that both parties agreed to end Gelinas’ employment relationship on an
24 amicable basis. *Id.* The Separation Agreement contains, *inter alia*, a provision that reaffirms
25 Gelinas’ Non-Compete Agreement, a provision that the governing law is Minnesota law, and
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1 an agreement to arbitrate any “controversy or claim arising out of or relating to this Agreement,
2 or its breach, or to the employment relationship between the Employee and the Company, shall
3 be settled by final and binding arbitration, upon the request of either party, in Minneapolis,
4 Minnesota.” *Id.* at sections 4 and 6.

5 Shortly thereafter, on or about December 5, 2007, Gelinas accepted a position
6 with Bergquist’s direct competitor, Laird Technologies, Inc. Complaint ¶ 15. On February 5,
7 2008, Bergquist’s legal counsel informed Gelinas of the claimed breach of the parties’ Non-
8 Compete Agreement and Separation Agreement and requested that he refrain from any
9 activities in violation thereof. Douglas Decl. ¶ 2, Exh. A. Gelinas was unresponsive to the
10 request. *Id.* Therefore, in accordance with the parties’ agreement, Bergquist commenced an
11 arbitration proceeding at the NAF and also filed an action in the U.S. District Court for the
12 District of Minnesota seeking to compel arbitration.

13 **III. LANGUAGE OF THE AGREEMENTS**

14 The parties are signatories to two written agreements that, in combination,
15 require this matter to be heard in Minnesota and decided under Minnesota law. First, the Non-
16 Compete Agreement contains a provision stating that any and all disputes concerning their
17 business dealings be resolved in accordance with Minnesota law. Second, the Separation
18 Agreement reaffirms the Non-Competition Agreement and specifically provides that any claim
19 relating to the employment relationship shall be conducted under the Rules of the NAF in
20 Minneapolis, Minnesota.
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1 A. **The Parties Entered Into A Non-Competition, Non-Solicitation, And**
 2 **Confidentiality Agreement Providing That the Choice of Law Shall Be**
 3 **Minnesota Law.**

4 Prior to commencing employment with Bergquist, the parties entered into the
 5 Non-Compete Agreement. Douglas Decl. ¶ 14, Exh. M. The Non-Compete Agreement states:

- 6 14. **Applicable law.** This Agreement should be interpreted and
 7 enforced in accordance with the laws of the State of
 8 Minnesota, without regard to its choice of law principles or
 9 rules.

10 Douglas Decl. ¶ 14, Exh. M.

11 B. **The Parties Entered into a Separation Agreement and General Release**
 12 **Providing That All Matters Arising From the Agreement Be Arbitrated In**
 13 **Minnesota.**

14 On November 26, 2007, Gelinas executed a Separation Agreement and General
 15 Release. Douglas Decl. ¶ 15, Exh. O. The Separation Agreement stated that Gelinas was to
 16 continue to comply with the terms of the Non-Compete, Non-Solicitation, and Confidentiality
 17 Agreement executed on May 3, 2004:

- 18 4. You will continue to comply with the terms of the Non-
 19 Compete, Non-Solicitation and Confidentiality Agreement
 20 between you and the Company, executed on May 3, 2004,
 21 and know and understand that the obligations contained in
 22 that Agreement survive execution of this Agreement and
 23 your termination of employment. In particular, you shall
 24 not disclose any confidential or proprietary information
 25 (specifically including pricing, margins, key customer
 26 contracts and their profiles not generally known to the
 public) which you acquired as an employee of the
 Company to any other person or entity, or use such
 information in any manner that is detrimental to the interest
 of the Company. A copy of your Confidentiality
 Agreement is attached as Exhibit A.

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1 The Separation Agreement also contains the following arbitration provision:

- 2 6. Any controversy or claim arising out of or relating to this
3 Agreement, or its breach, or to the employment relationship
4 between the Employee and the Company, shall be settled
5 by final and binding arbitration, upon the request of either
6 party, in Minneapolis, Minnesota. Such arbitration shall
7 proceed in accordance with the then governing rules of the
8 National Arbitration Forum (NAF). Judgment upon the
9 award rendered may be entered and enforced in any court
10 of competent jurisdiction. It is agreed that the parties shall
11 choose a single, neutral arbitrator from among a panel of
12 not less than seven (7) proposed arbitrators, and that the
13 parties may have no more than two (2) panels of arbitrators
14 presented to them by the NAF. The parties agree that they
15 shall each bear their own costs associated with the
16 arbitration, including any filing fee to be paid by them and
17 their own legal counsel expenses. The parties further agree
18 that they shall share equally in the reasonable costs and the
19 fees of the neutral arbitrator.

20 The Separation Agreement also provided:

- 21 2.c. In exchange for the promises contained in this Agreement
22 and release of claims as set forth below, and provided that
23 you sign this Agreement and return it to me by forty-five
24 (45) days from the date of this Agreement is delivered to
25 you on or by December 5, 2007, whichever is later, and do
26 not revoke this Agreement:
- (1) The Company will pay the year-end payout for RSM NA Sales Incentive Compensation (which includes the Revenue, Design-Win and IPO components) to be paid in a single payment after financial audit on or about the 3rd week of December, after this Agreement is signed, and upon the expiration of all applicable revocation periods stated in this Agreement.

27 Douglas Decl. ¶ 15, Exh. N. The policy states in relevant part that “if an employee voluntarily
28 resigns or is terminated for performance related issues of for cause prior to the last day of the
29 Plan Year, the award is forfeited.” Douglas Decl. ¶ 16, Exh. O (redacted).

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Thus, this dispute involves the application, interpretation or construction of two written agreements between the parties which, taken together, require that all disputes relating to Gelinas' former employment relationship with Bergquist and his post-employment activities be arbitrated in accordance with the Rules of the National Arbitration Forum in Minneapolis, Minnesota. Indeed, both parties recognize the existence and requirements of the arbitration clause as both Bergquist and Gelinas have filed affirmative claims for relief with NAF.

IV. ARGUMENT -- THE MATTERS BEFORE THIS COURT SHOULD BE DISMISSED BECAUSE THE MINNESOTA ACTION IS THE FIRST-FILED ACTION.

Because the Minnesota action is the first-filed action, principles of judicial comity and economy require that the issues raised by Gelinas in this action be dismissed. Both actions involve, at their core, a dispute within the scope of the arbitration provision. The action filed in the Minnesota U.S. District Court merely seeks to preserve the status quo, to protect the integrity of the arbitral process, and to compel arbitration in accordance with the terms of the parties' agreements. In short, Gelinas should not be allowed to preempt the arbitral process by filing this action, especially when he is, simultaneously, pursuing a claim for monetary relief in the arbitral forum.¹

A. The First-Filed Rule is a Sensible Rule Designed to Promote the Orderly and Speedy Resolution of Disputes and to Avoid Redundant Actions.

The Ninth Circuit recognizes the doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district. *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982); *Church of Scientology of Calif. v. U.S. Dep't of the Army*, 611 F.2d 738, 749 (9th Cir. 1979); *Great N. Ry. Co. v. National R.R. Adjustment Bd.*,

¹ Gelinas has filed a counterclaim for some \$92,000 under the same agreement in the NAF in Minnesota.

1 422 F.2d 1187, 1193 (7th Cir. 1970); *see also*, *SAES Getters S.P.A. v. Aeronex, Inc.*, 219
2 F. Supp. 2d 1081 (S.D. Cal. 2002).

3 As the Ninth Circuit has observed, the “purpose of the comity principle is of
4 paramount importance. The doctrine is designed to avoid placing an unnecessary burden on the
5 federal judiciary and to avoid the embarrassment of conflicting judgments.” *Church of*
6 *Scientology*, *supra* at 750 (citing *Great N. Ry. Co. v. National R.R Adjustment Board*, *supra*).
7 In *Church of Scientology*, *supra*, the Ninth Circuit reaffirmed the validity and utility of the
8 first-filed rule:

9 We emphasize that the “first to file” rule normally serves the
10 purpose of promoting efficiency well and should not be
11 disregarded lightly.

12 *Id.* at 750.² The Ninth Circuit has long adhered to the policy considerations favoring deference
13 to the first-filed action:

14 . . . increasing calendar congestion in the federal courts makes it
15 imperative to avoid concurrent litigation in more than one forum
16 whenever consistent with the rights of the parties. A court may
17 choose not to exercise its jurisdiction when another court having
jurisdiction over the same matter has entertained it and can achieve
the same result.

18 *Crawford v. Bell*, 599 F.2d 890, 893 (9th Cir. 1979).

19 It cannot be disputed that the first action filed involving these parties and these
20 agreements was filed by Bergquist in the U.S. District Court for the District of Minnesota.
21 That action was commenced by filing of the complaint on February 28, 2008. Douglas
22 Decl. ¶ 2, Exh. A. This action, originally filed in the Superior Court of Santa Clara County,
23 according to the Court’s file-stamp on the face of the complaint, was filed 28 days later on

24 ² In that case, the Court decided to “overlook the ‘first to file’ rule” only because a federal district
25 court in the District of Columbia had not, improperly in the view of the Ninth Circuit, deferred to the
26 Central District of California, and the litigation was by then fairly advanced in the District of Columbia.

1 March 27, 2008. The federal court in Minnesota acquired subject matter jurisdiction over this
2 dispute on February 28, 2008. Thus, under the general rule according priority to the federal
3 court in which jurisdiction first attached, this Court should defer to the U.S. District Court for
4 the District of Minnesota and dismiss this action.³

5 Furthermore, the cases involve the same parties and issues. The identity of the
6 parties and the subject matter of parallel federal actions need not be identical in order for the
7 first-filed rule to be applicable. See *Crawford v. Bell*, 599 F.2d 890, 892-93 (9th Cir. 1979)
8 (individual action dismissed where plaintiff was class member in pending class action).
9 Federal courts have recognized that the comity considerations of the first-filed rule require only
10 that the two actions be “substantially identical.” *SAES Getters S.P.A. v. Aeronex, Inc.*, 219
11 F. Supp. 2d 1081, 1089 (S.D. Cal. 2002). Here, it is undisputed that the parties are identical
12 and that the dispute arises out of the identical contracts.

13 In this case, it is clear that the Minnesota action is the first-filed action and the
14 cases involve the same parties and issues. Moreover, the Minnesota action, unlike this action,
15 is not a preemptive suit. In fact, the Minnesota action promotes the parties’ intent as expressed
16 in their agreements that all disputes between them relative to Gelinas’ employment with
17 Bergquist would be arbitrated in Minneapolis, Minnesota. Accordingly, the equitable and
18 sensible principles that underlie the first-filed rule favor dismissing this action.

19 **B. This Action is a Blatant Effort to Engage in Forum Shopping and Should Not**
20 **Be Permitted to Take Precedence Over the First-Filed Action.**

21 In line with the Supreme Court’s decision in *Kerotest Manufacturing Co. v. C-*
22 *O-Two Fire Equipment Co.*, 342 U.S. 180 (1952), a review of the relevant factors demonstrates
23

24 ³ The only other alternatives available to this Court are (1) staying this action until completion of
25 the Minnesota action and the underlying arbitration proceeding or (2) transferring this action to the
26 federal district court in Minnesota under 28 U.S.C. § 1404. See *Cedars-Sinai Medical Center v. Shalala*,
125 F.3d 765, 768-69 (9th Cir. 1997).

1 why this Court should defer to the District of Minnesota action. The Court may consider such
2 factors as whether the first-filed action is merely anticipatory in nature, intended to win the
3 “race to the courthouse,” or would otherwise impose an unfair burden on Bergquist in the first
4 action. None of the exceptions to the first-filed rule, however, apply in this case. Indeed,
5 properly viewed, the action commenced in this Court by Gelinas is precisely the type of
6 preemptive lawsuit frowned upon by the federal courts as forum shopping. *See Xoxide, Inc. v.*
7 *Ford Motor Co.*, 448 F. Supp. 2d 1188, 1193 (C.D. Cal. 2006).

8 The suit commenced by Bergquist in the U.S. District Court for the District of
9 Minnesota is intended to preserve and protect the integrity of the arbitral process. It seeks
10 neither declaratory relief nor substantive relief on the merits. Nor does the Minnesota action
11 represent an effort by Bergquist to preempt Gelinas’ choice of forum or to engage in forum
12 shopping. Indeed, the outcome sought by Bergquist in the Minnesota action is the enforcement
13 of the arbitration agreement that underlies the parties’ dispute and a bar to external proceedings
14 that would undermine it. If a federal court in any district were to enforce the arbitration
15 agreement according to its plain terms, the arbitration proceeding and any related judicial
16 proceedings would take place in Minnesota.

17 By contrast, Gelinas’s action commenced in this Court is intended to do
18 precisely the opposite. It seeks to wrest jurisdiction of the dispute from the arbitrator and to
19 transplant it into a federal court in California. Moreover, Gelinas’s Complaint in this action
20 seeks not to promote or protect the integrity of the arbitral process, rather it seeks to avoid it
21 entirely. Gelinas’s action will result in concurrent litigation in two federal forums involving
22 the same parties and subject matter. Gelinas’s later-filed Complaint is inconsistent with the
23 principles of judicial economy and comity and serves only to increase the burden on the federal
24 courts and both parties.⁴

25 ⁴ Any matters that Plaintiff desires to raise under Section 1404(a) are appropriately addressed to the
26 Court in the first filed action. *Pacesetter Systems, supra.* at 96.

CONCLUSION

Gelinas's efforts to avoid arbitration and his improper attempt to evade his obligations under the parties' agreement to arbitrate should not be permitted. This Court should apply the first-filed rule and dismiss this action. Gelinas has filed a counter-claim in arbitration. Moreover, if he has objections to the arbitral process, he may address his concerns to the U.S. District Court for the District of Minnesota, where this action was first filed. Alternatively, Defendant respectfully requests this Court to transfer the action to Minnesota, or stay proceedings until the matters are resolved in accordance with the parties' agreement.

Dated: June 6, 2008

/s/ Julie Raney

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CERTIFICATE OF SERVICE

I certify that on June 6, 2008, I caused to be mailed a copy of the Notice of Motion and Motion to Dismiss by U.S. Mail, postage prepaid, upon counsel of record for Plaintiff whose address is as follows:

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/s/ Beba Maletic-Arsov
BEBA MALETIC-ARSOV

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